LFL SDN BHD v. KERAJAAN MALAYSIA & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[ORIGINATING SUMMONS NOS: WA-24-46-09-2020 &
WA-24-51-10-2020]
21 JANUARY 2022

Abstract – *Singapore's Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA'), by virtue of s. 60, provides that when an offence is committed by a person outside of Singapore, that person may be dealt with in respect of that offence as if it had been committed within Singapore. A Malaysian non-governmental organisation (NGO) cannot make false statements of facts that offend the provisions of the POFMA and later claim that the POFMA is invalid and inapplicable in Malaysia just to avoid any action under the Singapore law in Singapore. Singapore is certified as a sovereign nation and has been given immunity from the jurisdiction of a Malaysian court. The High Court of Malaya is not seized with the jurisdiction to adjudicate on the validity of the POFMA.*

CIVIL PROCEDURE: *Striking out – Application for – Malaysian non-governmental organisation ('NGO') issued press statement on website regarding method of execution of death penalty in Singapore – NGO received notification by Singapore's office of Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA') that press statement contained false statements of fact – NGO directed to insert correction notice – NGO commenced originating summons at High Court of Malaya seeking declarations that provisions of Singapore's POFMA could not be enforced in Malaysia – Whether originating summons scandalous, vexatious and frivolous and abuse of court process – Whether ought to be struck out*

CIVIL PROCEDURE: *Jurisdiction – High Court – Malaysian non-governmental organisation ('NGO') issued press statement on website regarding method of execution of death penalty in Singapore – NGO received notification by Singapore's office of Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA') that press statement contained false statements of fact – NGO directed to insert correction notice – NGO commenced originating summons at High Court of Malaya seeking declarations that provisions of Singapore's POFMA could not be enforced in Malaysia – Whether High Court seized with jurisdiction to adjudicate on validity of POFMA – Whether Singapore enjoyed sovereign immunity*

The plaintiff had issued a press statement on its website regarding the method of the execution of death penalty in Singapore ('16th article'). Singapore's office of the Protection from Online Falsehoods and Manipulation Act 2019 ('POFMA'), upon learning about the 16th article, notified the plaintiff that

(i) the 16th article contained false statements of fact; (ii) Singapore's Minister of Home Affairs ('defendant'), in exercise of his statutory powers under the POFMA, directed the plaintiff to insert a correction notice ('correction direction') and the failure to comply with the correction direction, without reasonable excuse, would amount to an offence under s. 15 of the POFMA; (iii) the plaintiff could apply to the defendant to vary/cancel the correction direction; and (iv) in the event the application for variation/cancellation was refused, the plaintiff could appeal to the High Court of Singapore to set aside the correction direction ('direction dated 22 January 2020'). The defendant then issued a press statement informing that the 16th article was false and the correction direction had been issued. However, the plaintiff did not comply with the correction direction and, instead, proceeded to file two applications, by way of originating summons ('OS'), namely OS 46 and OS 51. In OS 46, the plaintiff sought orders that (i) it had a right to express its opinions in Malaysia with regard to any matters, pursuant to the right to freedom of speech under art. 10(1)(a) of the Federal Constitution; (ii) its right could not be impaired by a law in Singapore, namely the POFMA, which purported to extend its laws beyond Singapore, that was assuming extra-territorial jurisdiction; and (iii) it could not be subjected to any process within Malaysia in furtherance of the Singapore law. In OS 51, the plaintiff sought (i) declarations that (a) the direction dated 22 January 2020 issued by the defendant could not be enforced against the plaintiff in Malaysia; and (b) the defendant, or anyone acting under his authority, could not take any action to enforce any provision of the POFMA against the plaintiff within Malaysia; and (ii) an injunction to restrain the defendant from enforcing Singapore's laws, in particular the POFMA, or taking any action related to it, within Malaysia against the plaintiff. The Government of Malaysia, as the defendant in OS 46, and the Attorney General of Malaysia, as the intervener in OS 51, applied to strike out the plaintiff's OS on the grounds that they were scandalous, vexatious and frivolous and otherwise an abuse of the process of court.

Held (allowing applications to strike out OS 46 and OS 51):

(1) Singapore enacted the POFMA to prevent the electronic communication of falsehoods, as well as to safeguard against the use of online platforms for the communication of such falsehoods. The POFMA puts in place various measures to counteract the effect of false communications and to prevent the misuse of online accounts. Section 60 of the POFMA provides that, when an offence is committed by a person outside Singapore, that person may be dealt with in respect of that offence as if it had been committed within Singapore. Malaysia too has laws that are applicable to persons outside its territory. Section 233 of the Communications and Multimedia Act 1988 ('CMA') makes it an offence, *inter alia*, for a person to use a network facility or network

service to initiate the transmission of any false communication with the intent to annoy, abuse, threaten or harass another person. Section 4(1) of the CMA stipulates that the CMA applies to both within and outside Malaysia. (paras 13-15)

(2) Both OS 46 and OS 51 called for the court to determine the validity of the defendant's action against the plaintiff under the provision of the POFMA. However, the court was not seized with the jurisdiction to adjudicate on the validity of the POFMA. The law as to jurisdiction had to be strictly observed by the court, as set out in s. 23 of the Courts of Judicature Act 1964 which explicitly set out the general civil jurisdiction of the High Court. Both OS 46 and OS 51 were frivolous and vexatious and an abuse of the process of the court, with no prospect to succeed. (paras 12, 16, 20 & 28)

(3) The Yang di-Pertuan Agong recognised Singapore as a foreign sovereign. A certificate to this effect was issued by the Secretary General of the Malaysian Ministry of Foreign Affairs. With the issuance of the certificate, (i) Singapore is clothed with sovereign immunity from the jurisdiction of this court; and (ii) this court was barred from exercising its jurisdiction to further inquire into the plaintiff's complaints in the OS. Furthermore, the defendant, in issuing the correction direction pursuant to the provisions of the POFMA, was an act undertaken by the authority of sovereign State of Singapore. This was clearly a governmental act (*acta jure imperii*) and therefore protected by sovereign immunity. (paras 23, 24 & 26)

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77 SC ***(refd)***

Hap Seng Plantations (River Estates) Sdn Bhd v. Excess Interpoint Sdn Bhd & Anor [2016] 4 CLJ 641 FC ***(refd)***

Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors [2017] 10 CLJ 743 HC ***(refd)***

Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***

Tan Keat Seng Kitson v. Kerajaan Malaysia [1996] 2 CLJ 722 HC ***(refd)***

Legislation referred to:

Communications and Multimedia Act 1988, ss. 4(1), 233

Courts of Judicature Act 1964, s. 23

Federal Constitution, art. 10(1)(a)

Protection from Online Falsehoods and Manipulation Act 2019 [Sing], ss. 11, 15

For the plaintiff - Gurdial Singh Nijar, Shahid Adli Kamarudin & Abraham Au Tian Hui; M/s Daim & Gamany
For the defendant and intervener - Suzana Atan & Narkunavathy Sundareson; SFCs

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid J:

Introduction

[1] The plaintiff had on 18 September 2020 filed an application by way of originating summons (OS) (OS 46) seeking, *inter alia,* the following orders:

(i) that the plaintiff has a right to express their opinions in Malaysia with regard to any matters as part of their right to freedom of speech under art. 10(1)(a) of the Federal Constitution;

(ii) that the plaintiff's right cannot be impaired by a law in Singapore, namely the Singapore Protection from Online Falsehoods and Manipulation Act 2019 (POFMA), which purports to extend its laws beyond Singapore, that is assuming extra-territorial jurisdiction; and

(iii) that the plaintiff cannot be subjected to any process within Malaysia in furtherance of the Singapore law.

[2] The plaintiff had also on 2 October 2020 filed an application by way of OS (OS 51) seeking, *inter alia,* the following orders:

(i) a declaration that the direction dated 22 January 2020 issued by the defendant under s. 11 of the POFMA cannot be enforced against the plaintiff in Malaysia;

(ii) a declaration that the defendant or anyone acting under his authority cannot take any action to enforce any provision of POFMA against the plaintiff within Malaysia; and

(iii) an injunction to restrain the defendant, his servants or agents or anyone acting on his direction from enforcing Singapore's laws, in particular POFMA, or taking any action related thereto, within Malaysia against the plaintiff.

[3] *Vide* an order dated 23 December 2020, the Attorney General of Malaysia was granted leave to intervene in OS 51 as intervener.

Brief Facts

[4] The facts leading to the filing of OS 46 and OS 51 are as follows:

(i) on 16 January 2020, the plaintiff had issued a press statement [the 16th article] on their website regarding the method of the execution of death penalty in Singapore;

(ii) according to the plaintiff, the 16th article was issued in the public interest because there are many Malaysian citizens facing the death penalty at Changi Prison in Singapore and their fair and just treatment is a matter of public concern in Malaysia;

(iii) *vide* letter dated 22 January 2020, POFMA office notified the plaintiff that:

(a) the 16th article which was being communicated in Singapore contained false statement of fact;

(b) the defendant in exercise of his statutory powers under POFMA directed them to insert a correction notice no later than 23 January 2020 [correction direction];

(c) failure to comply with the correction direction without reasonable excuse was an offence under s. 15 of the POFMA;

(d) they could apply to the defendant to vary or cancel the correction direction; and

(e) in the event the application for variation or cancellation was refused they could appeal to the High Court of Singapore to set aside the correction direction;

(iv) on 22 January 2020, the defendant also issued a press statement informing that the 16th article was false and the correction direction had been issued;

(v) the plaintiff did not comply with the correction direction or avail themselves to the other option; and

(vi) instead, the plaintiff released another press statement on 22 January 2020 [22nd article] demanding that the Singapore Government withdraw the correction direction; contending amongst others that Singapore could not interfere with the freedom of speech of Malaysians in Malaysia and that Singapore was attempting to extend their jurisdiction to Malaysians in Malaysia.

The Striking Out Applications

[5] The striking out application was filed by the Government of Malaysia as the defendant in OS 46 (encl. 7) and by the Attorney General of Malaysia as the intervener in OS 51 (encl. 29) on the grounds that they are scandalous; vexatious and frivolous and otherwise an abuse of the process of this Honourable Court.

[6] In gist, the striking out applications are premised on the following grounds:

(i) that a Malaysian court has no jurisdiction to decide on the validity of a foreign law as it conflicts with 'international comity';

(ii) that Singapore is certified as a sovereign nation and has been given immunity from the jurisdiction of a Malaysian court; and

(iii) the plaintiff is resorting to this court to avoid himself from any action under the Singapore law in Singapore.

[7] At the conclusion of the hearing, I allowed the Government of Malaysia's application (encl. 7) and the Attorney General of Malaysia's application (encl. 29). This judgment contains the full reasons for my decision.

The Law

[8] The principles governing the striking out application are set out in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 1 MLRA 611; [1993] 3 MLJ 36 wherein Mohamed Dzaiddin SCJ (as he then was) held:

> The principles upon which the court acts in exercising its power under any of the four limbs of O. 18 r. 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable.

[9] In *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1; [2016] 2 MLRA 263; [2016] 3 MLJ 1; [2016] 2 AMR 795, wherein Justice Ramly Ali FCJ (as he then was) held as follows:

> [26] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* (*supra*) are, *inter alia* as follows:
>
> (a) It is only in plain and obvious cases that recourse should be had to the summary process under the rule;
>
> (b) This summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it '**obviously unsustainable**';
>
> (c) It cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;
>
> (d) If there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and

(e) The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable. (emphasis added)

The Decision Of The Court

[10] Having fully and carefully considered the plaintiff's applications, the Government of Malaysia and Attorney General's case and the issues raised in the affidavits and written submissions, I allowed the application to strike out (encl. 7 and 29) of the plaintiff's OS 46 and OS 51.

[11] It is the plaintiff's contention that the said Singapore law cannot impose liability on the plaintiff in the circumstance of this case or at all because it seeks to assume extra-territorial effect. And it cannot do so in particular for one or more of the following reasons:

(i) It would be a breach of the principle of comity of nations. This means that Singapore cannot interfere with the sovereignty of another state (Malaysia) by enacting legislation extending to Malaysia citizens exercising their right within Malaysia;

(ii) The legislation practically cannot be applied to Malaysian citizens present in Malaysia particularly in this case where the alleged communication was not in Singapore;

(iii) POFMA and the directions issued thereunder seek to interfere with the rights of the plaintiff to exercise their freedom of speech in Malaysia pursuant to art. 10 of the Federal Constitution of Malaysia; and

(iv) Singapore cannot in this way seek to extend the tentacles of their law to other countries and their citizens.

[12] Upon perusal of the plaintiff's OS 46 and OS 51, I am of the view that both the plaintiff's OS call for this court to determine the validity of the defendant's action against the plaintiff under the provision of the POFMA.

[13] It is to be noted that Singapore enacted the POFMA to prevent the electronic communication of falsehoods as well as to safeguard against the use of online platforms for the communication of such falsehoods. The Act puts in place various measures to counteract the effect of false communications and to prevent the misuse of online accounts.

[14] Section 60 of the POFMA provides that when an offence is committed by a person outside Singapore, that person may be dealt with in respect of that offence as if it had been committed within Singapore.

[15] It is noteworthy that Malaysia too has laws that are applicable to persons outside its territory. Section 233 of the Communications and Multimedia Act 1988 [Act 588] that makes it an offence, *inter alia*, for a person to use a network facility or network service to initiate the

transmission of any false communication with intent to annoy, abuse, threaten or harass another person. Section 4(1) of Act 588 stipulates that the Act 588 applies both within and outside Malaysia.

[16] Based on the above, I am of the considered opinion that this court does not have the jurisdiction to adjudicate on the validity of the POFMA.

[17] I find support in my view by referring to the case of *Tan Keat Seng Kitson v. Kerajaan Malaysia* [1996] 2 CLJ 722; [1996] 1 MLJ 454; [1995] 4 MLRH 116; [1996] 1 AMR 536. The issue before the court was whether the plaintiff, a Singaporean by birth who later obtained Malaysian citizenship, remained liable to enlist for compulsory national service in Singapore under Singapore's Enlistment Act. The plaintiff filed an action in the Malaysian High Court against the Malaysian Government and had sought a series of declarations including a declaration that he was not obliged to register for national service in Singapore.

[18] Abdul Malik J (as he then was) in dismissing the plaintiff's application held at p. 465 as follows:

> The general civil jurisdictions of the Malaysia courts are set out in s. 23 of the Courts of Judicature Act 1964 ...
>
> *It is beyond peradventure that this court has no jurisdiction to adjudicate on matters pertaining to the Constitution of the Republic of Singapore and the Singapore Enlistment Act (Cap 9, 1992 Ed) which the plaintiff wants this court to do*. Briefly put, the declarations sought for (prayers (a) and (c)) are that the plaintiff be declared a Malaysian citizen and, consequently, not bound to register in the Singapore army as a national service recruit. In so far as the first part of the declaration that was sought for, it is the defendant's case that there is no necessity for such a declaration as the plaintiff is already a full-fledged Malaysian citizen. *As the second declaration involves a foreign country, the cause of action arose in that foreign country and not in Malaysia and, consequently, the Malaysian courts have no jurisdiction to adjudicate*.
>
> (emphasis added)

[19] His Lordship concluded at p. 479 as follows:

> It is my considered view that **there is no power to make a declaration on a subject relief in respect of which is beyond the jurisdiction of this Cour**t."; citing with approval Lord Diplock's judgment in *Buck & Ors v. Attorney-General* [1965] 1 All ER 882, wherein the Court of Appeal held that **the validity of a foreign law was a subject matter over which the English courts had no jurisdiction**. (emphasis added)

[20] I am of the view that the law as to jurisdiction has to be strictly observed by this court as set out in s. 23 of the Courts of Judicature Act 1964 which explicitly set out the general civil jurisdiction of High Court.

(See also *Hap Seng Plantations (River Estates) Sdn Bhd v. Excess Interpoint Sdn Bhd & Anor* [2016] 4 CLJ 641; [2016] 3 MLJ 553; [2016] 3 MLRA 345; [2016] 3 AMR 1; *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1; [2008] 3 MLJ 771; [2008] 1 MLRA 581).

[21] It is to be noted that the courts in Malaysia have adopted the theory of "restricted" sovereign immunity rather than absolute sovereign immunity. Absolute immunity would mean that any proceedings against a foreign State are inadmissible unless that State expressly agrees to waive such immunity whereas, restrictive immunity would mean that the immunity is only available in respect of sovereign activities or governmental acts (*acta jure imperii*) and not acts of a commercial nature (*acta jure gestionis*).

[22] The then Supreme Court in *Commonwealth Of Australia v. Midford (M) Sdn Bhd & Anor* [1990] 1 CLJ 878; [1990] 1 CLJ (Rep) 77; [1990] 1 MLRA 364; [1990] 1 MLJ 475 held as follows:

> *In applying the doctrine of sovereign immunity our Courts, whether in the exercise of its civil or criminal jurisdiction, should have by international comity disclaimed jurisdiction in this case especially after the production of the certificate from Wisma Putra stating that the Yang Di-Pertuan Agong has recognised the Commonwealth of Australia as a foreign state.* In the circumstances and for the reasons stated we therefore allowed the appeal with costs and set aside the order of the High Court dated 16 September 1988. (emphasis added)

(see also *Hii Yii Ann v. Deputy Commissioner Of Taxation Of The Commonwealth Of Australia & Ors* [2017] 10 CLJ 743; [2018] 7 MLJ 393; [2017] MLRHU 864; [2017] 5 AMR 684).

[23] It is not disputed that in the instant case, the Yang di-Pertuan Agong had on 16 April 2020 recognised Singapore as a Foreign Sovereign. A certificate to this effect was issued by the Secretary General of the Malaysian Ministry of Foreign Affairs.

[24] Therefore, it is my view that with the issuance of that certificate recognising Singapore as a Foreign Sovereign, Singapore is clothed with sovereign immunity from jurisdiction of this courts.

[25] To me, the certificate issued is conclusive evidence on the immunity and this recognition bars this court from exercising jurisdiction to further inquire into the plaintiff's complaints in the OS.

[26] Further, I view that the act of the defendant in issuing the correction direction pursuant to the provisions of the POFMA was an act undertaken by the authority of sovereign state of Singapore. This is clearly a governmental act (*acta jure imperii*) and therefore protected by sovereign immunity.

[27] Based on the above, I agree with the submission of the learned Senior Federal Counsel that there is no jurisdictional basis in law and/or in procedural basis for the plaintiff's OS and/or the form and nature of the reliefs he seeks.

Conclusion

[28] Having considered the plaintiff's pleadings, the affidavits and the arguments of both sides and having given the matter the utmost careful consideration, in my view, the present case comes within the category of plain and obvious case as envisaged in the case of *Bandar Builder Sdn Bhd* (*supra*) for the reason that both the OS are frivolous and vexatious and an abuse of the process of the court. The action has no prospect to succeed.

[29] In view of the reasons above, I allowed the Government of Malaysia's application (encl. 7) and the Attorney General of Malaysia's application (encl. 29) to strike out both the plaintiff's OS 46 and OS 51 with no order as to costs.